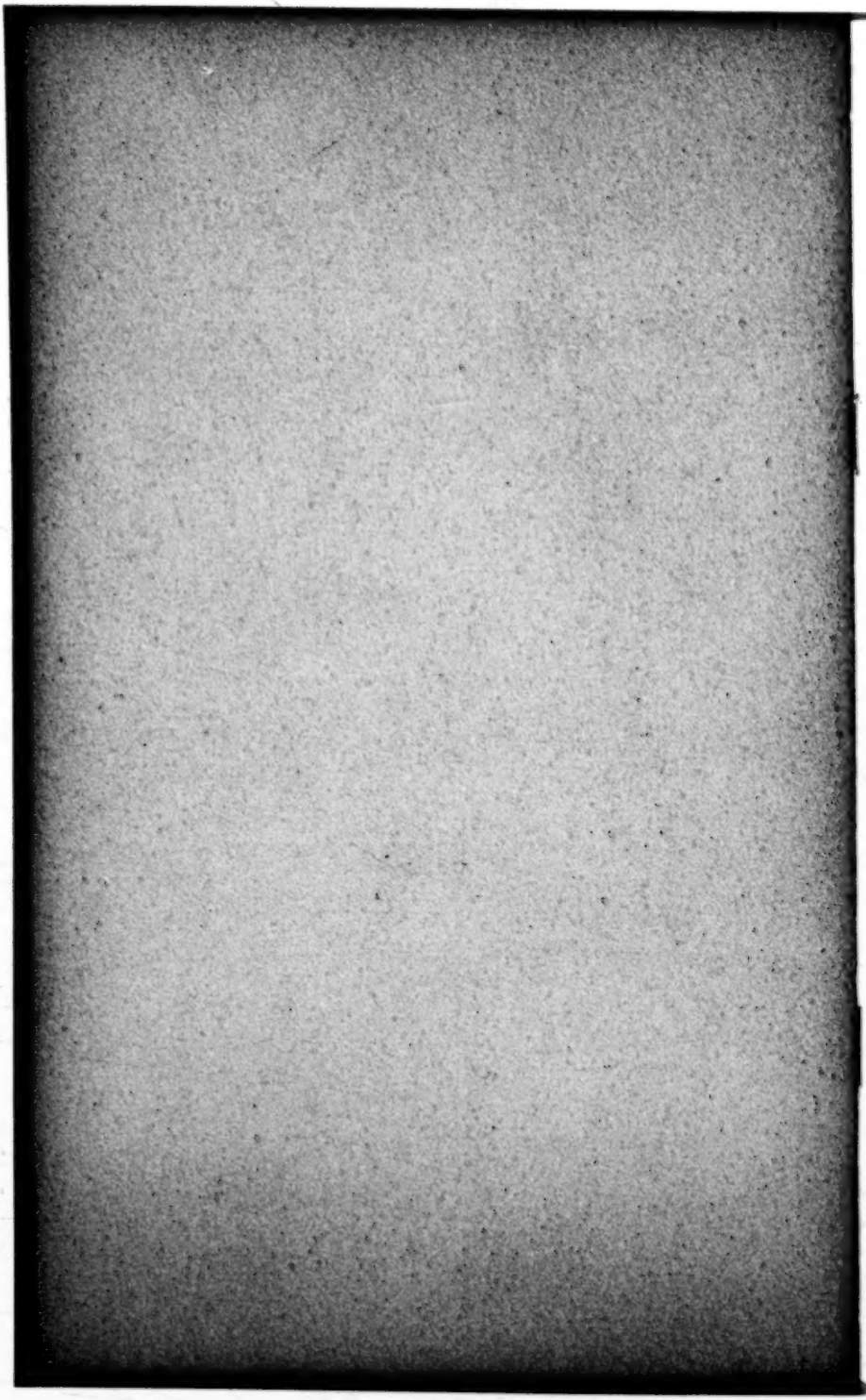

In The

Supreme Court of the United States

October Term, 1972

No. 72-1322

CAROLYN BRADLEY, ET AL.,
Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Respondents, the School Board of the City of Richmond, Virginia, and the individual members thereof, respectfully submit that this Court should deny the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 29, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 472 F.2d 318. The opinion of the Court of Appeals in the companion case, *Thompson* v. *School Board of City of Newport*

News, which was reprinted at pp. 78a-81a of Petitioners' Appendix is reported at 472 F.2d 177.

JURISDICTION

Petitioners' jurisdictional statement is accurate and the petition was timely filed pursuant to an order extending the time for filing entered by Mr. Chief Justice Burger. On April 9, 1973, Respondents requested an extension of time within which to file a brief in opposition to the petition. By action of the Clerk of this Court on April 11, 1973, the request was granted and the time extended to and including May 23, 1973.

STATEMENT

The Petition before this Court is solely and specifically concerned with the propriety of the District Court's award of the Petitioners' fees, costs and expenses in the amount of $56,419.65 for the period of approximately 11 months from March 10, 1970 to January 29, 1971, in the Richmond school desegregation case[1] (53 F.R.D. 42, A. 29; 472 F.2d 320, A. 35).

On March 10, 1970, the Petitioners filed a motion for further relief in the case to which was appended an application for an award of reasonable attorneys' fees to be paid by the Richmond School Board. After approving, on an interim basis, the School Board's Plan for the desegregation of city schools for 1970-71,[2] the District Court on Jan-

[1] As Petitioners have pointed out (Pet. 4-5), this matter concerns only that litigation which pertained to schools, pupil reassignments, and transportation within the City of Richmond; accordingly, the later aspects of the case involving metropolitan relief which are currently before this Court in Nos. 72-549 and 72-550 are not here involved.

[2] Bradley v. School Bd. of City of Richmond, 317 F.Supp. 555 (E.D. Va. 1970).

uary 29, 1971, denied Petitioners' request for mid-year implementation of a more extensive desegregation plan.[3] Following its acceptance of another School Board plan for the 1971-72 session,[4] the District Court entered its opinion and judgment ordering the School Board to pay the award in question (53 F.R.D. 28; A. 1-33).

At the time of District Court's opinion, the established standard under which a court in the exercise of its equitable discretion could award counsel fees in school desegregation cases required findings of an "extraordinary" situation where a defendant school authority had persisted in a continuing pattern of "unreasonable, obdurate obstinacy" or defiance of the law.[5]

The District Court based its decree both on findings that the School Board had indeed exhibited the required obduracy in the face of clear legal demands (53 F.R.D. 30-33, 39-41; A. 1-9, 21-25), and, as an alternative ground, that "by reason of the unique character of school desegregation suits, justice require[d] that fees should be awarded" (53 F.R.D. 30, 41-42; A. 1-2, 25-28).

In reversing the lower Court's order, however, the Court of Appeals found that neither ground sustained the award (472 F.2d 320; A. 35) since the District Court's finding

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[3] Bradley v. School Bd. of City of Richmond, 324 F.Supp. 456, 457-61 (E.D. Va. 1971).

[4] Bradley v. School Bd. of City of Richmond, 325 F.Supp. 828 (E.D. Va. 1971).

[5] Bradley v. School Bd. of City of Richmond, 345 F.2d 310, 321 (4th Cir.), *vacated and remanded on other grounds*, 382 U.S. 103 (1965); Bell v. School Bd. of Powhatan County, 321 F.2d 494, 500 (4th Cir. 1963). Other courts of appeals were likewise applying the standard first expressed by the Fourth Circuit. *E.g.*, Williams v. Kimbrough, 415 F.2d 874, 875 (5th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); Rolfe v. County Bd. of Educ., 391 F.2d 77, 81 (6th Cir. 1968); Kemp v. Beasley, 352 F.2d 14, 23 (8th Cir. 1965).

of "obdurate obstinacy" was erroneous in that it was not supported by the record (472 F.2d 320-27; A. 36-51), and that since the authorization of such awards as a means of implementing public policy was a matter for legislative rather than judicial discretion (472 F.2d 328-31; A. 53-60), the lower Court had further erred in not adhering to the traditional equitable standard which the Appeals Court had been applying for nearly a decade (472 F.2d 331; A. 60).

After the Court of Appeals had reached the foregoing conclusions but before it had issued its opinion (472 F.2d 331; A. 60), Congress enacted Section 718 of the Education Amendments Act of 1972[6] (Pet. 3), which expressly authorizes awards of reasonable attorneys' fees in school desegregation cases under enumerated conditions. Under the terms of this Act, Section 718 became effective on July 1, 1972.[7]

The Petitioners promptly alerted the Court of Appeals as to the existence of Section 718 and urged that it authorize the award made by the lower Court for services rendered prior to the effective date of the new statute (472 F.2d 331; A. 60-61). The Appeals Court withheld the opinion it had previously prepared in this case and conducted an *en banc* hearing to determine the applicability of Section

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[6] Pub. L. No. 92-318, 86 Stat. 235. Section 718 is a part of the "Emergency School Aid Act" which comprises Title VII of the Education Amendments Act of 1972 and which is codified at 20 U.S.C.A. §§ 1601-1619 (Cum. Supp. 1973). *See also*, 1 U.S. CODE CONG. & AD. NEWS 278, 421-42 (92d Cong. 2d Sess. 1972).

[7] Under the "general provisions" portion of the Education Amendments Act of 1972, Section 2(c)(1) provides in part as follows: "Unless otherwise specified, each provision of this Act and each amendment made by this Act shall be effective after June 30, 1972 . . . ." *See* 1 U.S. CODE CONG. & AD. NEWS *supra* at 279.

718 in this as well as in other cases then before it[8] (472 F.2d 331; A. 60-61). Questions pertaining to the applicability of Section 718 were thoroughly briefed including a specific consideration of its legislative history to ascertain if retroactive operation might have been intended by Congress.

Following full arguments, the Court of Appeals concluded its opinion in this case by holding that Section 718 by its own terms was inapplicable in the first instance[9] (472 F.2d 331-32; A. 61-62) and even if applicable, it did not reach legal services rendered prior to its effective date (472 F.2d 331; A. 61).[10]

ARGUMENT

The Respondents respectfully submit that this case presents no special or important reason for review by this Court.

In setting aside the award of attorneys' fees for the period from March, 1970 through January, 1971, the Court of Appeals correctly applied the traditional equitable standard which has been uniformly adhered to in determining the propriety of such awards in school desegregation cases. With respect to its application of this established rule to legal services rendered prior to July 1, 1972, the Appeals Court's decision conflicts neither with that of any other

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[8] See Thompson v. School Bd. of City of Newport News, 472 F.2d 177 (4th Cir. 1972) (Per Curiam) and companion cases (A. 78-81).

[9] The Appeals Court reasoned that "there was no 'final order' pending unresolved on appeal" when Section 718 became effective and that Section 718 could not therefore be applied irrespective of *when* the legal services in question were rendered (472 F.2d 331-32; A. 61-62).

[10] *See* Thompson v. School Bd. of City of Newport News, 472 F.2d 177, 178 (4th Cir. 1972) (Per Curiam) (A. 79-80).

court of appeals nor with applicable decisions of this Court.

Any necessity for a different standard governing awards of counsel fees in school desegregation cases has been adequately fulfilled by the Congressional enactment of Section 718 of the Education Amendments Act of 1972 encompassing all legal services rendered subsequent to July 1, 1972. The Court of Appeals properly found this legislatively conceived standard inapplicable to the services performed below.

Thus, there is no significant federal question in this case requiring this Court's resolution.

I.

The Decision Below Reflects An Adherence To The Standard Which Has Been Uniformly Applied For Nearly A Decade By All Courts Of Appeals Which Have Considered Awards Of Attorneys' Fees In School Desegregation Cases.

The standard applied by the Court of Appeals in reversing the award in question has such a deeply rooted precedential basis that Petitioners are loth to give it any serious discussion. At the outset of its opinion the Appeals Court expressed this rule in the following terms:

> This Court has repeatedly declared that only in "the extraordinary case" where it has been " 'found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy' or persistent defiance of law," would a court, in the exercise of its equitable powers, award attorney's fees in school desegregation cases.

(472 F.2d 320; A. 35) (citation omitted). This was perhaps an exercise in understatement, however, since the rule was first enunciated in this same Circuit nearly ten years

ago,[11] later enlarged upon in 1965,[12] and has been consistently applied to date.[13]

Of even greater significance, however, this governing standard for the award of counsel fees in school desegregation cases which first evolved in the Fourth Circuit has been adopted and uniformly applied to date by Courts of Appeals for the Fifth,[14] Sixth,[15] Eighth[16] and Ninth[17] Circuits, the

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[11] Bell v. School Bd. of Powhatan County, 321 F.2d 494, 500 (4th Cir. 1963).

[12] Bradley v. School Bd. of City of Richmond, 345 F.2d 310, 321 (4th Cir.), *vacated and remanded on other grounds*, 382 U.S. 103 (1965).

[13] *E.g.*, Bradley v. School Bd. of City of Richmond, 472 F.2d 318, 320 (4th Cir. 1972) (A. 34, 35-36); Brewer v. School Bd. of City of Norfolk, 456 F.2d 943, 949-51 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972); Walker v. County School Bd. of Brunswick, 413 F.2d 53, 54 (4th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); Felder v. Harnett County Bd. of Educ., 409 F.2d 1070, 1075 (4th Cir. 1969).

[14] *E.g.*, Johnson v. Combs, 471 F.2d 84, 85, 87 (5th Cir. 1972), *rehearing and rehearing en banc denied*, 472 F.2d 1405 (5th Cir. 1973); Horton v. Lawrence County Bd. of Educ., 449 F.2d 793, 794 (5th Cir. 1971) (cited by Petitioners at p. 5); Williams v. Kimbrough, 415 F.2d 874, 875 (5th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).

[15] *E.g.*, Monroe v. Board of Comm'rs. of City of Jackson, 453 F.2d 259, 263 (6th Cir.), *cert. denied*, 406 U.S. 945 (1972) (cited by Petitioners at p. 5); Rolfe v. County Bd. of Educ., 391 F.2d 77, 81 (6th Cir. 1968); Hill v. Franklin County Bd. of Educ., 390 F.2d 583, 585 (6th Cir. 1968).

[16] Walton v. Nashville, Ark. Special School Dist. No. 1, 401 F.2d 137, 145 (8th Cir. 1968); Jackson v. Marvell School Dist. No. 22, 389 F.2d 740, 747 (8th Cir. 1968); Clark v. Board of Educ. of Little Rock School Dist., 369 F.2d 661, 670-71 (8th Cir. 1966); Kemp v. Beasley, 352 F.2d 14, 23 (8th Cir. 1965); Rogers v. Paul, 345 F.2d 117, 125-26 (8th Cir.), *vacated and remanded on other grounds*, 382 U.S. 198 (1965). In *Clark* v. *Board of Education of Little Rock School District*, 449 F.2d 493 (8th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972) (cited by Petitioners at p. 5), the Eighth Circuit awarded attorneys' fees for services performed in connection with the *appeal* only. *Id.* at 499. Nevertheless, in view of its earlier findings in the

only appellate courts which have had occasion to consider this precise question.

As was noted at p. 3 *supra*, the District Court applied this traditional standard, but the Court of Appeals reversed holding simply that the record failed to support the lower Court's findings that the School Board had exhibited that pattern of condemnable conduct which sustained an award of counsel fees.

The elaborate suggestion advanced by the Petitioners (Pet. 5-16) that this action on the part of the Court of Appeals is tantamount to an approval of a "rule" in the Fourth Circuit that school authorities are under no affirmative obligation to disestablish dual school systems (Pet. 13-16) serves merely to introduce non-issues and to obscure the controlling nature of the precedent upon which the decision below is based. No fair reading of the Appeals Court's opinion admits of such a characterization. The application of long-settled law in this case in a manner which fully comports with the decisions of every court of appeals which has considered the same question presents no occasion for this Court's review.

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same case of "obstinate, adamant, and open resistance to the law" *Id.* 369 F.2d at 671, the reasonable implication is that the Eighth Circuit fully adhered to the traditional standard in approving an award for appellate services. The fact that the same Court denied attorneys' fees in a school desegregation case decided the same day as *Clark, Davis* v. *Board of Education of North Little Rock School District*, 449 F.2d 500, 502 (8th Cir. 1971) (Per Curiam), effectively negates any suggestion that the Eighth Circuit has departed from the traditional standard.

[17] Kelly v. Guinn, 456 F.2d 100, 111 (9th Cir. 1972) (cited by Petitioners at p. 5).

II.

The Congressional Enactment Of Section 718 Renders Moot Any Issue Concerning The Need For An Additional Federal Standard Governing Awards Of Attorneys' Fees In School Desegregation Cases And Further Judicial Intervention In This Area Is Both Unnecessary And Inappropriate.

Perhaps in recognition that the record would not fully support an award of attorneys' fees against the School Board under the traditional equitable standard delineated at pp. 3, 6 *supra*, the District Court predicated its ruling on an alternative ground, *i.e.*, "that in 1970 and 1971 the character of school desegregation litigation ha[d] become such that full and appropriate relief must [have] include[d] the award of expenses of litigation" (53 F.R.D. 41; A. 25). The Court of Appeals rejected this ground, however, finding that it was essentially "a means of implementing public policy" (472 F.2d 328; A. 53) and that since such authorizations were matters for legislative rather than judicial action (472 F.2d 328, 330-31; A. 53-54, 59, 60), the award of counsel fees in school desegregation cases was to be governed solely by the traditional standard (472 F.2d 331; A. 60).

The significant, indeed controlling, factor surrounding the Court of Appeals' reluctance to broaden the scope of counsel fee awards through judicial fiat is that the very congressional authorization it found as lacking vis-a-vis the period of time involved in this case became a reality with the passage of Section 718 of the Education Amendments Act of 1972. This explicit statutory allowance for awards of attorneys' fees to prevailing parties in school desegregation cases is, under the unanimous view of the

Appeals Court, now fully applicable to any such cases pending before it.[18]

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[18] Thompson v. School Bd. of City of Newport News, 472 F.2d 177, 178 (4th Cir. 1972) (Per Curiam) (A. 79).

As was noted previously at pp. 4, 5 *supra*, a number of issues concerning the applicability of Section 718 were raised, briefed and argued in this case. The Court of Appeals, although it clearly considered Section 718 as it pertained to this case, found that the construction urged by the Petitioners, *i.e.*, that "final order" embraced any appealable order dealing with any issue raised in a school desegregation case, was improper since there was no "final order" entered as "necessary to secure compliance" which was pending unresolved on appeal at the time Section 718 became effective (472 F.2d 331-32; A. 60-62). Thus, as far as Section 718 affected this case, the Appeals Court found that by *its own terms* it was inapplicable. Even if the terms of Section 718 had been satisfied, however, the award here would not have been validated since the Court in applying familiar legal principles ruled in *Thompson* that only legal services rendered *after* the effective date of Section 718 were compensable under it (472 F.2d 178; A. 79-80). On this latter point, the only other court which has considered the precise question, the United States Court of Appeals for the Fifth Circuit, has likewise declined to apply Section 718 retroactively. Johnson v. Combs, 471 F.2d 84, 86-87 (5th Cir. 1972), *rehearing and rehearing en banc denied*, 472 F.2d 1405 (5th Cir. 1973).

The Petitioners nevertheless argue that the decision below conflicts with that of this Court in *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268 (1969), to the effect that an appellate court must apply the law in effect at the time it renders its decision. *Id.* 281. The gist of Petitioners' contentions (Pet. 34) is that *Thorpe* required the Court of Appeals to apply Section 718 regardless of whether or not this case came within the specific terms of the statute itself (the Court found it did not—472 F.2d 331-32; A. 61-62) and regardless of whether or not Congress clearly intended it to be applied retroactively (the Court found no such intention—472 F.2d 178; A. 79-80).

The effect of Petitioners' argument is that *Thorpe* requires application of newly enacted legislation to cases pending in appeals courts *irrespective of legislative intent*, and that its rationale supplants the cardinal rule of legislative construction, *i.e.*, that a statute is presumed to operate prospectively absent a clearly expressed legislative intention to the contrary. *E.g.*, Greene v. United States, 376 U.S. 149, 160 (1964) *citing* Union Pac. R. Co. v. Laramie Stockyards Co., 231 U.S. 190, 199 (1913). Neither the circumstances of *Thorpe* nor rationale expressed therein, nor indeed, anything contained in its genesis, *United States* v. *Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801), reasonably suggests any such drastic import.

Ignoring the existence of this statute under which a *more* uniform nationwide standard governing the award of attorneys' fees in school desegregation cases could not be imagined, the Petitioners contend that the decision below merits review because of a need for this Court to "establish a uniform Federal rule" concerning attorneys' fees for "private attorneys general" who sue to enforce important Congressional or Constitutional policies (Pet. 16-27). As the argument goes, because the Court of Appeals rejected this "private attorneys general" theory as a basis for the award below whereas it has been applied by other courts *in other types of litigation not involving school desegregation*, a conflict has arisen which compels resolution in this Court.

It is respectfully submitted that any conflict in this area is more imaginary than real. The Petitioners are unable to report any decision, other than that of the District Court below, wherein an award of attorneys' fees in a school desegregation case has been based on the suggested private attorneys general standard. Indeed the only conflict has been between the District Court and the Court of Appeals in this case.[19] Such circumstances clearly present no occasion for this Court's review.

More properly, the Petitioners' argument (Pet. 16-27) suggests that owing to the lateness of the date, plaintiffs seeking the vindication of constitutional rights who are forced into court by defiant school authorities should no longer be required to bear the expenses of such litigation; accordingly, the private attorneys general standard for

[19] In fact, the United States Court of Appeals for the Fifth Circuit has agreed with the Fourth Circuit in specifically rejecting this standard as applicable in school desegregation cases. Johnson v. Combs, 471 F.2d 84, 87 (5th Cir. 1972), *rehearing and rehearing en banc denied*, 472 F.2d 1405 (5th Cir. 1973).

counsel fee awards should be extended to school desegregation litigation through the establishment of a new judicially created rule. While the School Board has never questioned the philosophical basis for such a new standard and is in agreement with much of the rationale underlying its advancement, the Congressional enactment of Section 718 has now afforded plaintiffs throughout the nation with measures which should be fully adequate in preventing "recalcitrant state officials" from forcing "unwilling victims of illegal discrimination" in public education "to bear the constant and crushing expense of enforcing their constitutionally accorded rights" (Pet. 15).

Since Congress has now enacted a uniform standard governing awards of attorneys' fees in school desegregation cases which has effectively disposed of any necessity for a judicially created federal rule in this area, further judicial intervention clearly would be inappropriate and no important federal question remains for this Court's resolution.[20]

CONCLUSION

Since the decision below is in all respects consistent with both applicable rulings of this Court and with other courts of appeals as well, and the need for any uniform federal rule governing awards of counsel fees in school desegregation cases was eliminated with the enactment of Section 718,

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[20] The Petitioners also urge that the decision below conflicts with decisions of this Court and other courts of appeals in that it was predicated on a requirement that benefits to the class represented must have been pecuniary in nature (Pet. 28-32). The basis for this argument is unclear at best. Neither the District Court nor the Court of Appeals utilized this "class benefit" theory as a basis for the respective holdings. Even though the theory does appear in an earlier opinion of the Court of Appeals in *Brewer* v. *School Board of City of Norfolk*, 456 F.2d 943, 951-52 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972), it is no part of this case.

no basis for this Court's review has been demonstrated. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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